Community Television of Southern California, a/k/a KCET-TV; Educational Broadcasting Corporation, a/k/a WNET/Thirteen; and WGBH Educational Foundation, a/k/a WGBH-TV *and* The Writers Guild of America, East, Inc. Case 2–CA–23435

August 31, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On February 8, 1991, Administrative Law Judge Joel P. Biblowitz issued the attached decision. Respondent WGBH Educational Foundation, a/k/a WGBH-TV (WGBH) filed exceptions and a supporting brief; The Writers Guild of America, East, Inc. (the Union) filed exceptions and a supporting brief; Respondents Community Television of Southern California, a/k/a KCET-TV (KCET) and Educational Broadcasting Corporation, a/k/a WNET/Thirteen (WNET) filed answering briefs to the Union's exceptions; and the General Counsel refiled his brief to the judge.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.

1. We agree with the judge's finding that the parties had not reached impasse on August 15, 1988.[1] Respondent WGBH claims, however, that even assuming no impasse had been reached, it was compelled by business necessity on August 15 to implement changes. We do not agree. As of August 15, writing services for the ''State of the World'' project[2] were to begin. Nothing occurred on August 15, however, which justified an immediate implementation of Respondent WGBH's Annenberg proposal, a proposal that included the indisputably mandatory subject of compensation for writing services. Because Respondent WGBH has not established that the failure to reach an agreement on the Annenberg issue materially affected its business opportunities, we find that the record does not support a finding of business necessity for implementing the Annenberg proposal unilaterally on August 15.[3]

2. Respondent WGBH asserts that it was free to implement its last offer on August 15 because the Union was insisting on concessions regarding foreign copyright, which Respondent WGBH argues is a permissive subject of bargaining. We find that the record does not support Respondent WGBH's claim that the Union was insisting, over WGBH's opposition, that the contract contain provisions on foreign copyright.

A party may not insist on the acceptance of a nonmandatory proposal as a condition of reaching agreement once the other party has refused to bargain over the nonmandatory subject. *Laredo Packing Co*., 254 NLRB 1, 19 (1981). It is not unlawful, however, to include a nonmandatory proposal in a bargaining package and bargain, even to the point of impasse, over that package when the parties voluntarily engage in bargaining over such a proposal. *Good GMC, Inc*., 267 NLRB 583 (1983). In such circumstances, the party is not clearly insisting on agreement to the nonmandatory subject as a price for its agreement to any contract at all. It is merely indicating the substance of what it is willing to offer on mandatory subjects if a particular nonmandatory provision is included. So long as both parties voluntarily bargain over the nonmandatory subject, it cannot be said that the willingness of either to agree to a contract without a provision on the nonmandatory subject has been put to the test.

In this case, Respondent WGBH willingly bargained over the foreign copyright issue. In fact, Respondent WGBH argues in its brief to the Board that it ''repeatedly requested a foreign copyright proposal from the Union.'' Here, as in *Good GMC*, supra at 585, we find that Respondent WGBH's ''failure ever to demand that the [foreign copyright] matter be removed from the bargaining table and its apparent willingness to [bargain about] the matter is . . . evidence that the parties had not exhausted bargaining and that the Union's position was not intractable.'' Also, as in *Good GMC*, given Respondent WGBH's failure to test the Union's position by demanding removal of the copyright issue from bargaining, we cannot find Mangan's statement to the Respondent's negotiator that ''they [WGBH] were not going to get Annenberg without agreeing to foreign copyright'' establishes that the Union was in-

[1] All subsequent dates refer to 1988 unless specified otherwise.

We do not rely on the number of bargaining sessions held between June 15 and August 15 or on evidence of any agreements reached by the parties in negotiations subsequent to August 15 as factors supporting the finding that the parties had not reached impasse. We disavow the implication in the judge's decision that an employer can never advance the date of impasse or declare an impasse on the basis of business necessity.

[2] This project was partially funded by the Annenberg Foundation.

[3] Had Respondent WGBH established that the Annenberg Foundation required an advance written guarantee of the Annenberg rights, we might be persuaded that Respondent had established a business necessity defense. The record evidence does not support such conclusion. First, while the Annenberg Foundation previously had requested a written guarantee, it willingly continued negotiating the project after deadlines passed. Second, the Annenberg Foundation was not even aware of the August 15 deadline Respondent WGBH unilaterally imposed on the Union. Finally, the Respondents themselves proposed, and the parties discussed, a ''grandfathering arrangement'' whereby the Annenberg writing project would begin, collective-bargaining negotiations would continue, and any agreement ultimately reached would be retroactive to August 15. Though the parties did not agree to the form such an arrangement would take, Respondent WGBH's willingness to discuss such an arrangement undermines any contention that business necessity compelled unilateral action on August 15.

sisting to impasse on that matter. Rather, under the circumstances, we find that the statement was consistent with a stance of hard bargaining.

Thus, having agreed with the judge that the parties were not at impasse and that the Union had not insisted on the foreign copyright proposal as a condition to agreement on a contract,[4] we agree with the judge that Respondent WGBH violated the Act by unilaterally changing terms and conditions of employment.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, WGBH Educational Foundation, a/k/a WGBH-TV, Boston, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Insert the following as paragraph 2(a) and reletter the subsequent paragraphs.

''(a) On request, bargain collectively in good faith with the Union as the exclusive bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed written agreement:

> All persons who furnish literary material as defined in the collective-bargaining agreement, except for staff employees furnishing material other than format, stories, teleplay (telescripts), and narrations which are other than news as defined in the collective-bargaining agreement.''

[4] We therefore need not decide whether the foreign copyright issue is a permissive subject.

Polly Chill, Esq., for the General Counsel.
Don T. Carmody, Esq. (Carmody & Goldstein), for the Respondents.
Franklin K. Moss, Esq. (Spivak, Lipton, Watanabe & Spivak), for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on 8 hearing days between September 18, 1989, and March 8, 1990, in New York, New York. The complaint issued on March 30, 1989, and was based on an unfair labor practice charge filed on February 13, 1989, by the Writers Guild of America, East, Inc. (the Union). The complaint alleges that between about July 8, 1988,[1] and about December 6, the Union has requested certain information from Community Television of Southern California, a/k/a KCET-TV (KCET), Educational Broadcasting Corporation, a/k/a WNET/Thirteen (WNET), and WGBH Educational Foundation, a/k/a WGBH-TV (WGBH) (collectively Respondents), but that the Respondents have refused to supply this information to the Union, in violation of Section 8(a)(1) and (5) of the Act. The complaint also alleges that on August 15, WGBH unilaterally changed the terms and conditions of employment of its employees represented by the Union, by implementing a new pay schedule for certain of these employees, in violation of Section 8(a)(1) and (5) of the Act. On the entire record, including my observation of the witnesses and the briefs received, I make the following

[1] Unless indicated otherwise, all dates referred to are for the year 1988.

FINDINGS OF FACT

I. JURISDICTION

KCET, a domestic corporation with an office and place of business in Los Angeles, California, is engaged in the operation of a not-for-profit public television broadcasting system. Annually, in the course and conduct of these business operations, it derives gross revenue in excess of $100,000 and purchases and receives at its facility products, goods, and materials valued in excess of $5000 directly from points outside the State of California.

WNET, a domestic corporation with an office and place of business in New York, New York, is engaged in the operation of a not-for-profit public television broadcasting system. Annually, in the course and conduct of these business operations, it derives gross revenues in excess of $100,000 and purchases and receives at its facility products, goods, and materials valued in excess of $5000 directly from points outside the State of New York.

WGBH, a Massachusetts corporation with an office and place of business in Boston, Massachusetts, has been engaged in the operation of a not-for-profit public television broadcasting system. Annually, in the course and conduct of its business operation, it derives gross revenues in excess of $100,000 and purchases and receives at its facility products, goods, and materials valued in excess of $5000 directly from points outside the State of Massachusetts.

Respondents admit and I find that KCET, WNET, and WGBH are each employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[2]

II. LABOR ORGANIZATON STATUS

Respondents admit and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. BACKGROUND

The Union has had collective-bargaining agreements with Respondents, as well as other employers, for a number of years. The last such agreements were effective for the period July 2, 1985, through July 1 and shall be referred to as the

[2] On the final day at hearing, counsel for Respondents moved to amend their answers to include an additional affirmative defense based on *National Transportation Services*, 240 NLRB 565 (1979). I recommend that this belated defense be dismissed as totally lacking in merit.

Agreement.[3] The employees covered in these agreements (and in this matter) are freelance writers (as compared to salaried staff employees who write for the Respondents) who prepare literary material for the station. Some of these freelance writers also act as producers; employees who work in both categories are referred to as hyphenates.

This matter was precipitated by an extraordinary act of generosity by one Walter Annenberg, who gave an amount in excess of $40 million to the Corporation for Public Broadcasting (CPB), to dispense in order to assist educational television programing. Although this was certainly an admirable act on the part of Ambassador Annenberg, it created the difficulties that lead to the instant matter. The Agreement provided for a minimum payment of about $10,000 for a 1-hour documentary, plus ''residuals'' for tape sales and subsequent showings. More importantly, the station was limited to showing (or releasing) the program no more than four times in 3 years (four in 3), each release consisting of unlimited showings within a 7-day period. Stations receiving funds under a grant from the Annenberg Foundation (Annenberg Programs, Annenberg Money, or similar names) had to agree that shows produced with these funds could be shown an unlimited number of times during a 9-year period (for reasons to be discussed below). This created a conflict with the four in 3 provision of the Agreement. In addition, Annenberg and CPB required that the writers relinquish any potentional income from supplementary sources, such as tape sales. From about January 1986 through 1989, the parties attempted to solve the conflict in two fashions: one was a substantial increase in the minimum fee. In fact, by August, Respondents were offering 300 percent of the prior minimum. In addition, beginning in about January 1986, the parties began negotiating about what shall be referred to as foreign copyright. Mona Mangan, executive director of the Union (and the principal negotiator for the Union during the period in question) had learned that freelance writers could collect money for foreign broadcasts of their shows, especially in France. It was felt at that time that if the Respondents would waive any rights they had and let the writers receive this money, as well as raising the minimum writing fee, the Union might be willing to waive the four in 3 and agree to Annenberg's requirement for unlimited showings for 9 years. Unfortunately, due to the complexity of the foreign copyright issue, as well as other factors, the parties were not able to agree on these issues by August 15. At a negotiating session on August 15, WGBH, by Don Carmody, its counsel and chief negotiator, declared that it could wait no longer for a negotiated settlement of this issue and that, although it would continue negotiating, it would unilaterally change the existing minimum wage and four in 3 provision in order that it might commence the writing for an Annenberg-funded show—State of the World. Carmody and Respondents' witnesses testified that he stated at that time that the parties had reached an impasse; Mangan testified that he never did. Regardless, the issue to be decided is: was there an impasse on August 15.

The remaining issue is both related and unrelated to the Annenberg issue. Stated briefly, when it became clear that Respondents would eventually pay a higher minimum writer's fee to their members in exchange for Annenberg's required 9-year unlimited showings, beginning on about July 8, the Union requested figures detailing the total compensation of hyphenates[4] during 1985, 1986, 1987, and 1988, and the portion of that compensation representing writing fees. The refusal to supply this information to the Union is the remaining allegation.

IV. REFUSAL TO FURNISH INFORMATION

As will be stated more fully, supra, shortly after the execution of the Agreement, the parties began discussing the Annenberg issue and the 9-year unlimited rights that the stations had to turn over to Annenberg and CPB (rather than the four in 3 then in the Agreement) in order to qualify for Annenberg money. It was fairly obvious, even early on, that one method of reimbursing the writers for the loss of four in 3 was to pay them a higher minimum fee. The Union felt that with the resulting increase in the writer's minimum fee, the stations might attempt to offset that increase (in the case of hyphenates) by decreasing the producer[5] portion of the employee's fee. As an example, if under the Agreement, a hyphenate was paid the minimum $10,000 for his writing services and $40,000 for producing the program, his total compensation was $50,000. If the minimum writing fee became $30,000 (as it did in August) the station *could* lower the hyphenate's producer fee to $20,000 to offset the increase and end up paying the hyphenate the same $50,000. Mangan testified that, about that time, Sue Kantrowitz, general counsel and director of legal affairs for WGBH,[6] said that there was then no producer-writer money being offset, but that if she hired a new hyphenate, she might do it because the Union only represents the writers and it would have no say in any action it took regarding producers. (Kantrowitz denies having made this statement.) In addition, the Agreement contains the following offset provision:

> No part of any monies paid to or due the writer pursuant to any of the terms and conditions of this Agreement may be offset against the total amount paid to the writer for writing services or acquisition of literary material and non-covered services.

At a negotiating session on July 8, Mangan orally made this request:

> We asked for the history of the producer and writing fees at WGBH. They employed the most producers and so what our feeling was and we could get a real feel on what was going on if we used only WGBH's figures and also we didn't want to have to deal with all the data in the world. We thought that WGBH would probably produce it the most easily and so we asked it of GBH and we also had talked to people at GBH so we had some more hard information. We said, tell us what these writers had made as producers versus writers and let us see what kind of ratios exist and if they had an

[3] Counsel for the Union is only half joking when he referred to this Agreement as ''quite possibly the longest and most complicated collective bargaining agreement known to mankind.''

[4] Approximately 25 to 30 percent of the Union's members are hyphenates.

[5] The Union does not represent producers.

[6] Kantrowitz testified: ''I understood that they were looking to be sure that the 300% was a real payment to the writers.''

offset, then it should be really clear and then we could develop a ratio for writing fees.

On August 4, WGBH gave the Union pay information regarding five writers. Deeming that response inadequate for their demand, by letter dated August 17, the Union, by Steven Burrow, wrote to Carmody ''Re: WGBH Education Foundation:''

> I am writing to reiterate the WGA's request for information from the WGBH Educational Foundation, as expressed orally at our collective bargaining sessions on July 8, July 14, and August 15, 1988.
>
> In order to allow us to prepare a response to WGBH's proposal regarding special terms of employment to apply to projects funded in whole or in part by the Annenberg Foundation, we have asked that the station provide us with figures detailing (1) the total compensation of staff producer-writers during each year of the most recent contract, and (2) the portion of that compensation which represents writing fees earned pursuant to the freelance contract.
>
> As was stated at the August 15th session, WGBH's partial response to this request on August 4th (which concerned only the compensation paid to three writers over three one-year periods and two other writers over two one-year periods), is inadequate to enable us to draft a proposal which would assure that any additional compensation we might agree upon in return for expanded Annenberg rights, which WGBH has proposed, would represent a tangible gain for the producer-writers.
>
> As we have also repeatedly stated, information provided pursuant to this request will be kept confidential by the Guild, and no producer-writer's compensation figures will be disclosed to any other person other than as is necessary to develop our proposal on the Annenberg issue.

This letter was handed to Carmody at a bargaining session that day; his response was that the Union did not represent producers and that they would get what they are entitled to under the law. After that, the exchange of letters began: by letter dated and hand delivered on October 25 (again, ''Re: WGBH Education Foundation''), Burrows wrote to Carmody, inter alia:

> We have not received the information requested in our letter of August 17 and previously (as detailed in that letter).
>
> As we have repeatedly expressed at the bargaining table, without the information we have requested regarding the WGBH producer-writers, the Guild cannot meaningfully respond to the ''Annenberg proposal'' submitted on behalf of WGBH, KCET, WNET, et al.

By letter dated November 7, Carmody wrote to Burrows:

> I am in receipt of your letter of Tuesday, October 25, requesting from the WGBH Educational Foundation certain information pertaining to ''producer-writers'' employed by WGBH.
>
> In order to provide you with a most informed reply to your request, I would appreciate it if you would clarify whether you claim to heed this information in order to negotiate about the decision, itself, to produce the Annenberg programming, or to negotiate about the ''effects'' of that decision—more particularly, the compensation to be paid for the performance of covered services in the production of the Annenberg programming—or for both of these purposes.
>
> Also, it would be most helpful if you would explain your rationale for entitlement to the specified information concerning ''Producers'' employed by WGBH. I am unclear as to how information concerning the terms and conditions of employment of ''Producers'' relates to your stated need to submit a proposal on behalf of the Writers who you represent.

By letter dated December 6, Burrows wrote to Carmody:

> In response to your inquiry about the Guild's repeated requests for information needed for the purposes of collective bargaining, we seek the requested information to enable the WGA to formulate a proposal designed to assure that Guild-represented writers are in fact compensated for the additional uses they are being asked to provide the companies which produce Annenberg programming, should we eventually reach agreement regarding such additional uses. Because many of the likely writers of such programs are staff writer-producers at WGBH, we have, as stated previously, requested information needed to assure that any additional writing fees negotiated for Annenberg programs are not illusory, i.e., that they result in real, additional compensation for writer-producers. Based upon the very limited information you provided at our meeting in early August, the Guild's concern is not merely hypothetical.
>
> As this request has been so long outstanding, I hope that you will be able to provide the requested information without further delay.

By letter dated February 2, Burrows wrote Carmody, inter alia:

> At a series of collective bargaining sessions dating back at least to July 8, 1988, and in letters hand-delivered to you on August 17, October 25, and December 7, 1988, the WGA has repeatedly requested information regarding the staff producer-writers employed by WGBH. Specifically, the Union has requested figures detailing the total compensation of the staff producer-writers during each year of the most recent contract and identifying the portion of that total compensation attributable to payments for writing services, and the Union has asked for copies of all personal service contracts between WGBH and its staff producer-writers.
>
> Although the WGA has explained the reason it needs the requested information to enable it to participate effectively in the ongoing PBS negotiations, and has offered assurances that it will protect the confidentiality of any information provided, the requested information has not been provided. (Indeed, we have received no response of any kind to our letter of December 6.)
>
> I am writing to reiterate the Guild's request and—in the hope that the information will finally be provided prior to our bargaining session of February 3—to pro-

vide a brief explanation of the legal basis for our request, as a supplement the practical rationale which has previously been provided.

In light of your clients' previous intransigence in this matter, I am constrained to emphasize that the failure to provide this information in a timely fashion has severely obstructed the bargaining process, and clearly precludes the possibility of reaching a legal impasse—at least until the Guild receives and has an adequate opportunity to analyze and make use of the requested information.

Finally, by letter dated February 9, Carmody wrote Burrows, inter alia:

> We are surprised to stand accused of refusing to provide requested information in the circumstances present here, especially in light of the proposal advanced by your negotiating committee during our session of January 10.
>
> In this connection, toward the conclusion of that session, your committee proposed a package, accompanied by a statement to the effect that if our committee accepted the proposal, you no longer would need the information which is the subject of your correspondence.
>
> It would seem that any reasonable arbiter hardly would conclude that we have refused to provide information in such circumstances, at least unless and until your committee either withdraws its proposal—together with the companion pardon of whatever obligation to provide information you believe may exist—or unless and until our committee rejects your proposal, and we thereafter fail to provide information to which you are entitled.
>
> I do not recollect either event having occurred.
>
> Of course, please do not infer from this commentary any inclination on our part (which you might be tempted to infer) to accept your proposal at this time.

The Union never received the information.

Carmody's February 9 letter refers to one of Respondents' principal defenses to this allegation. As testified to by Herb Homes, director of labor relations for WNET, at a bargaining session on January 10, 1989, Mangan offered the Respondents a ''package deal'' and said: ''If indeed you can buy our package, I will withdraw the need for WGBH to have to supply the papers they've been seeking for many months.'' The package was not accepted by Respondents. At a mediation session in February 1989, the mediator asked if there was any way to get the parties together. Carmody answered: ''Well, one way is Ms. Mangan made a proposal to us. It was a package she offered and in exchange for the package and we accepted it, GBH will be relieved of having to supply this information.'' In testifying to the above statement, Homes added: ''Not that we would have accepted this, but that this was a way.'' On cross-examination by counsel for the Union, Homes was asked:

> Q. Did any of the employers buy the Union's package on either of those occasions?
>
> A. No.

Kantrowitz and Carmody similarly testified that at the January 1989 bargaining session, Mangan made a package offer involving Annenberg and said that if the Respondents accepted the package, then she would excuse WGBH from providing the requested information.

Counsel for Respondents defends that the Union waived its earlier requests for recognition by its package offer to Respondents in January and February. The reasoning appears to be that because Mangan said, ''If you accept our package, WGBH does not have to provide the information we requested.'' WGBH is relieved of its obligation, even though Respondents never accepted this offer, because it was never ''officially'' withdrawn by the Union. This defense is so frivolous as to require no further comment. However, in his brief, counsel for Respondents spends six pages for the proposal that since the Union did not respond to these assertions as contained in his February 9, 1989 letter. I should draw an adverse inference from their silence. I find it more likely that their silence was due to a feeling, like mine, that the position stated was so frivolous as to be unworthy of comment. The testimony of Respondents' witnesses is clear, that Mangan's offer to drop the request for information was contingent on Respondents ''buying'' or ''accepting'' her package, and they did not accept or buy it.

The complaint alleges that the Union requested information regarding the gross fees paid by ''Respondents'' to its members who are hyphenates and that it requested ''Respondents'' to furnish it with this information, but that ''Respondents'' have failed and refused to do so. However, an examination of the facts reveals that these requests were made solely to WGBH; there is absolutely no evidence of any request for this information having been made to WNET or KCET. Counsel for the Union states that because Carmody represented all three Respondents in their coordinated bargaining and he never stated that he was responding only on behalf of WGBH, all three Respondents were involved in this allegation. I reject this position. Mangan's request of July 8 specifies WGBH, and only WGBH, four times. The Union's August 17 request states that it involves ''WGBH Educational Foundation.'' This letter, as well as the subsequent letters between Burrows and Carmody refer solely to WGBH. The mere fact that Respondents bargained together for a new agreement, and employed the same attorney, is not enough to implicate WNET and KCET in this allegation where this information was never requested of them. I therefore recommend that this allegation be dismissed as to WNET and KCET.

Respondents further defend that the Union is not entitled to this information because it ''has immediate access to, or already possesses, the information.'' Mangan testified that at a meeting with union members during this period, she asked if they would give her that information and she received almost no information. The law is clear that an employer's obligation to furnish the union with relevant information is not excused merely because the union may have access to this information from other sources. *Postal Service*, 276 NLRB 1282 (1985). As the Board stated in *Kroger Co.*, 226 NLRB 512 (1976): ''The union is under no obligation where the employer may have such information available in a more convenient form.'' This defense is especially untenable here where, only, theoretically is this information otherwise available to the Union. It would, obviously, be difficult for the

Union to determine which of its members were hyphenates and to then convince them to state their salary as a writer and producer. It is not surprising that the Union was unsuccessful in obtaining this information on their own. I therefore reject this defense.

The ultimate issue, therefore, is whether the Union was entitled to this information from WGBH. In *Sheraton Hartford Hotel*, 289 NLRB 463 (1988), the Board set forth the rule to be applied in cases such as the instant matter, citing *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967), *Pfizer, Inc.*, 268 NLRB 916 (1983), and *Southern Nevada Builders Assn.*, 274 NLRB 350 (1985):

> Section 8(a)(5) obligates an employer to provide a union requested information if there is a probability that the information would be relevant to the union in fulfilling its statutory duties as bargaining representative. Where the requested information concerns wage rates, job descriptions, and other information pertaining to employees within the bargaining unit, the information is presumptively relevant. Where the information does not concern matters pertaining to the bargaining unit, the union must show that the information is relevant. When the requested information does not pertain to matters related to the bargaining unit, to satisfy the burden of showing relevance, the union must offer more than mere suspicion for it to be entitled to the information.

This case is unusual in that while it involves a request for information pertaining to employees within the bargaining unit (writers) and is therefore presumptively valid, the information requested also includes salary received as a producer, which is outside the bargaining unit. Regardless of which burden is placed on the Union, it is clearly satisfied here. As early as 1986, it was evident that the minimum fee paid to writers would have to be substantially increased to compensate for the Annenberg rights that the Respondents would have to turn over to CPB in exchange for the Annenberg funds. Whether or not Kantrowitz made the statement that Mangan attributes to her, there clearly was a resulting danger that an employer in this situation might attempt to offset this gain in writing fees by reducing the producing fees for the hyphenates. The best way for the Union to guard against this possibility was to obtain the writers' fees and producers' fees paid to hyphenates in the past and develop a ratio from the figures. This would be valuable to the Union in formulating contract language for a new offset provision or assist the Union in future arbitration proceedings on the subject. By refusing to provide the Union with this information, WGBH violated Section 8(a)(1) and (5) of the Act.

V. UNILATERAL CHARGES ON AUGUST 15

As stated, supra, shortly after the execution of the agreement in 1985, Kantrowitz was informed that WGBH was working on its first Annenberg project; she was also informed that the rights Annenberg required conflicted with the four in 3 provision contained in the Agreement. As a result, in about December 1985, she informed Homes and Carmody that WGBH was going to produce an Annenberg program and that ''they had committed to the rights that Annenberg needed at that time. So we discussed what we should do about that since we had obligations to others.'' They agreed that Carmody and Homes, who had a relationship with Mangan that Kantrowitz did not have, should meet with Mangan, which they did in about January 1986. Homes and Carmody explained the Annenberg situation to Mangan and the rights being demanded by Annenberg and CPB. ''And we asked for her cooperation and her help in order to make this thing workable for WGBH.'' Mangan replied that she would need a more specific proposal, although it might be difficult to sell to her membership, but that there was something that she wanted that was very important to her and the Union. She said that she had recently attended a meeting where she was informed that writers in France were then collecting moneys from two sources: one was when a program they had written appeared on French television. The other was from moneys received from taxes on blank video cassettes sold in France. She told Homes and Carmody that it could be easily settled because it would not cost the stations anything; all the stations need do is agree not to interfere with the Union's attempts to secure moneys due American writers in France. The collection agency handling these funds in France is S.A.C.D. At the conclusion of the meeting, Homes and Carmody told Mangan that they would consider anything, especially something that appeared relatively simple, but that she should give them a specific proposal on the foreign copyright issue. Shortly thereafter, Carmody and Homes had another meeting with Mangan, as well as representatives of S.A.C.D. At this meeting, the S.A.C.D. representatives informed Carmody and Homes that there were two ''revenue streams'': one was moneys available for broadcasting on French television programs for which the writers had written material, and the other, a tax on blank video cassettes, payable to directors, actors, and others, as well as writers.

Kantrowitz testified that on March 23, 1986, she attended a meeting with the Union at which foreign copyright was discussed; at this meeting she asked ''a whole host of questions'' on the subject to attempt to learn more about it. On July 9, 1986, Kantrowitz, Homes, and Carmody met with Mangan to discuss Annenberg. At this meeting, Kantrowitz told Mangan that she couldn't understand why the Union was being so difficult about reaching an agreement on Annenberg. She understood that they would be giving up some rights, but that the Annenberg programs were prestigious programs that writers would want to work on. She testified that Mangan said: ''I don't care what the writers in Boston want to do; I'm a horsetrader and you have to give me something in return. And what I want in return is the foreign author's money.'' At this meeting, Mangan also said that she wanted to extend foreign copyright beyond France, to include Germany, Switzerland, and Australia.

The parties next met on July 18, 1986; at this meeting the Union gave Carmody its first written proposal on foreign copyright. At the same time the Union presented a written proposal on Annenberg, which provided, inter alia, that for programs which receive 60 percent of their budget from Annenberg CPB, the stations will be allowed an unlimited number of releases to ''instructional facilities, when such releases are made as part of an established college course.''

At about this time, WGBH, by Kantrowitz, engaged Attorney Barbara Ginsberg, a copyright attorney, to represent them on the foreign copyright issue since Kantrowitz had never previously dealt with this issue. Between this time (mid-1986) and January the parties met on a number of occa-

sions to discuss Annenberg and foreign copyright; during this period they also exchanged proposals on these subjects. However, no agreement was reached. During this period, Barbara Ginsberg was reporting to Kantrowitz about her research into this area of foreign copyright. She testified to the numerous problems that she had with the Union's proposal: her initial difficulty had to do with scope. Whereas the Union initially referred only to France, their proposal covered the world outside the United States. Barbara Ginsberg told Kantrowitz that they should start with France before getting into a wider area. Additionally, she was concerned that the language of the grant of the copyright from the station to the writers was not exactly parallel to the grant of the writers back to the stations. She felt that the language should be exactly parallel because if the writers retained a copyright interest in the program, it might impair WGBH's copyright ownership and its ability to fully exploit its programs. The proposals involved the grant of copyrights in the finished programs; Barbara Ginsberg advised WGBH that it was preferable to make the grants in the writer's literary material rather than in the finished program. A further problem that she communicated to Kantrowitz was that coproductions with foreign companies might involve foreign law.

In August 1986, Barbara Ginsberg prepared some draft language on the foreign copyright issue for WGBH. She attended a meeting with the Union on October 9, 1986, at which time the Union gave them a foreign copyright proposal. At this meeting, Mangan asked her whether it would be possible for the companies to hold all the rights, but for the writers to ''hold some sort of shell of copyright.'' She told Mangan that this was not possible under U.S. copyright law. In January 1987, she prepared and transmitted to the Union a counterproposal to the Union's foreign copyright proposal discussed on October 9, 1986. The next meeting with the Union that she attended occurred in October 1987; at this meeting the Union presented WGBH with a counterproposal to Barbara Ginsberg's January 1987 proposal. This was the first meeting attended by Jane Ginsberg, an expert on French copyright law, retained by the Union. There was a discussion of whether the writers had to retain some rights in order to satisfy the French collection agency. Mangan replied that regardless of what the French collection agency required, copyright was a ''political issue'' with the Union and the writers would have to have some sort of copyright interest. Barbara Ginsberg drafted a counterproposal to the Union's proposal and it was given to the Union at a meeting on December 1, 1987, which she did not attend. At the December 1, 1987 negotiation session between himself and Mangan, Carmody also gave Mangan an Annenberg proposal. Briefly, this proposal provides that where a program receives 25 percent of its finding from Annenberg CPB, the stations have rights to unlimited broadcasts for 9 years and the writers would be paid 250 percent of the initial minimum compensation.

At this December 1, 1987 meeting, Carmody explained to Mangan the urgency of reaching an agreement (which will be discussed more fully below). At this meeting they ''reached a document specific agreement'' on the Annenberg issue, with one exception. Mangan continued to object to the 250-percent compensation, especially since Respondents had previously reached agreements with other unions providing for 300-percent compensation. Carmody told her that he could not agree to that with the Union until he saw what the outcome was on their foreign copyright discussion. No agreement was reached at that meeting on the subject of foreign copyright. On January 22, Carmody and Barbara Ginsberg met with Mangan to discuss foreign copyright. They discussed whether the copyright grant would be in the literary material or the finished program, and the territorial scope of the agreement, all without agreement. Barbara Ginsberg also told Mangan that the language of the grants (station to writer and writer to station) had to be parallel, whereas Mangan wanted the writers to retain something; there was no agreement on this, as well. There was also a discussion of damages for failure or a breach of notice provisions by WGBH or its licensees. Barbara Ginsberg objected that WGBH should not have to pay damages if one of its licensees failed to pass on the notice—that was beyond the power of WGBH. There was also no agreement on this. Barbara Ginsberg testified that these were ''significant issues. At that time these represented the main areas of disagreement and they were seemingly intractable.'' The parties did not meet again until June 15.

One important aspect of this case, and the principal aspect of WGBH's defense to this allegation, is that it had a deadline that it had to meet for the writing services for State of the World—its second Annenberg production. WGBH's first Annenberg program was the Nuclear Age, which was completed in about 1988 and broadcast early in 1989. Henry Becton, president and general manager of WGBH, testified that this was the first Annenberg project for WGBH and Annenberg and CPB were then ''developing their guidelines and their understanding of what they needed in order to be effective, so their guidelines evolved during the early stages of our applying for that grant.'' The agreement that WGBH executed with CPB for the Nuclear Age (in excess of 50 pages) provides that if WGBH was unable to obtain what we have been referring to as Annenberg rights, they would receive a decreased amount of money from Annenberg—CPB. Because they did not reach agreement on Annenberg by that time, they were not able to turn over these rights so they did suffer this financial penalty. Becton testified, in this regard: ''So, in fact, they let us off the hook on a one time only exception to that project.'' Andrew Griffiths, treasurer and chief financial officer of WGBH, testified that because they were unable to obtain Annenberg rights for the Nuclear Age production they ''ended up having to make a compromise, a one-time compromise I might add'' with Annenberg CPB to deduct $225,000 that they were to have received. He testified that Nuclear Age was ''a very exceptional case'' where both sides were ''in the early stages where they were formulating their requirements.'' He testified: ''It was a very unusual circumstance and one which they were not about to enter again.''

Griffiths testified extensively about the deadline (and later deadlines) involving State of the World, a production which cost approximately $8 million, about $2.2 million of which came from Annenberg, with another $550,000 from CPB. Because Annenberg grants are primarily for educational purposes, they made it clear that the production had to be ready for viewing in the fall semester of 1990 (September) with the accompanying college text available 6 months earlier. By letter dated May 3, Becton wrote to Mara Mayor, director of Annenberg CCPB project, stating: ''This letter is to respond

formally to your letter of April 9, 1987 and to accept the $2,000,000 support from the Annenberg CPB Project for the State of the World.'' The letter also states, inter alia: ''We will deliver to CPB broadcast rights consisting of 12 plays in 9 years for public television, except when initiated by an educational institution where we will provide 5 plays per year per entity for 9 years.'' The written agreement between CPB and WGBH for the production of State of the World was not executed until October 1989.[7] Griffiths testified that since 1987, he had been keeping Annenberg CPB informed of the progress of their negotiations to attempt to get the rights Annenberg required. In the fall of 1987, the CPB people were getting ''antsy,'' wanting to know when production would begin in order for them to set up their academic schedules. At one point CPB told Griffiths that they wanted a deadline for the delivery of the rights, and they chose December 1, 1987, and Griffiths agreed. At the conclusion of the Carmody-Mangan meeting on that date, Griffiths felt confident that they would soon reach agreement on the Annenberg issue and he and CPB agreed on a late January deadline.[8] Beginning about April 1, WGBH began dealing with the executive producer of the production, who was likewise dealing with the staff that had been hired. It was important, however, that writers be hired to work on the production. Griffiths testified:

> So that production schedule was of primary concern to me and the implications of getting caught in another situation was analogous to the nuclear age project where we had started production and were still negotiating rights and were in a very defensive position because of that, and I was determined not to be caught in that position again.

After the optimism of December 1, 1987, faded, Griffiths was informed by Carmody that they should still be able to reach agreement with the Union on Annenberg by July 1, and based on that, WGBH proceeded with its commitment on State of the World. As stated, supra, the executive producer was hired in April and producers were hired in about May.

Carmody testified that from January 1986 through early December 1987 Kantrowitz was informing him of the increased pressure from Annenberg CPB to complete the deal and get the rights they required or risk the loss of revenue from Annenberg CPB. It was his understanding that there was a December 1, 1987 deadline that caused him to arrange a last-minute meeting with Mangan on that evening which resulted in their tentative ''document specific agreement'' on Annenberg.

The December 1, 1987 negotiating session between Carmody and Mangan was the last regular negotiating session between the parties until June. The Agreement was to expire July 1 and Carmody attempted to commence negotiations in early June; however, Mangan was involved in difficult negotiations on the West Coast during that period, resulting in the first negotiating session being conducted on June 15. Between June 30 and August 15 there were two written agreements between the parties to extend the term of the Agreement. The first extension, for the period July 1 through July 31 was executed in May; the second, for the period August 1 through August 14, was, apparently, executed in August. Kantrowitz testified that they initially agreed only to the July 31 date because they were being pushed to commence production on State of the World and ''that was a late as we could go.'' When no agreement was reached by the end of July, WGBH determined that it could wait no longer than August 15. Kantrowitz testified: ''So August 15, for us, was really the absolute latest time that we could have kept all the pieces of the puzzle together.'' The ''pieces'' refers to the underwriting grants that the WGBH had received from foundations and endowments, the coproduction relationships that they had contracted for, and the writing that had to be commenced. They had previously hired hyphenates who were booking crews and doing research. ''At the point of August 15, they needed to actually start diagramming out the program and start performing services as would be covered under [the Agreement].''

Carmody testified that when Mangan informed him of her difficulty in being totally free to negotiate in early June because of her negotiations on the West Coast, she asked about extending the Agreement to mid-September. After consulting with his clients, he told Mangan that they would not extend past July because ''in early August at the latest'' WGBH had to commence writing services on State of the World. When it became clear in late July that no agreement would be reached by the end of the month, Mangan asked Carmody about a further extension of the Agreement. Carmody spoke to the executive producer of State of the World, as well as others at WGBH to try to get the best fix possible on the last day by which we would be in a position of having to assign the performance of writing functions in State of the World.'' Although initially determining that it would be early August, he eventually agreed to August 15. Steven Burrows, who was employed by the Union at that time as its associate counsel (at the time of the hearing, he was employed by AFTRA) testified that, in the last week of July, Carmody called the union office and asked if the Union could negotiate over the weekend. He told Carmody that since Mangan was then involved in negotiations on the West Coast it was unlikely that she would return prior to the July 31 expiration date and suggested that the Agreement be extended again. Carmody suggested that they pick a date reasonably far in the future so that they would be fairly certain of having enough time to reach agreement without the need for an additional extension agreement and suggested mid-October; however, he informed Burrows that WGBH had to begin producing their Annenberg programing no later than mid-August. Burrows testified: ''I know that it was made quite clear to us that they needed to begin producing the State of the

[7] As per the fact that the formal agreement for State of the World was not executed until 14 months after the alleged impasse, Griffiths testified:

> Television unlike many other businesses is a business where there are a lot of oral contacts made and when we make a commitment, even if it's an oral one, which may be years before we have a signed contract, if we make a commitment that we're going to deliver a program, we need to deliver it. And our credibility is at stake if we can't live by our agreements.

[8] Griffiths testified that in contrast to the Nuclear Age production where both sides ''had gotten into a situation we couldn't get out of'' and thereafter agreed on a penalty for the failure to supply the requested rights, ''they were not going to bend their rules again on the State of the World,'' and he did not ask them to do so.

World project . . . as of August 15.'' Therefore, although the Agreement would be extended to mid-October, any agreement affecting Annenberg and State of the World would be retoactive. After discussing this with Mangan, Burrows informed Carmody that the retroactive provision was not acceptable to the Union. Carmody told Burrows that without the retroactive provision regarding State of the World, his clients would not agree to any date beyond August 14. As stated, the final extension of the Agreement was until August 14.

As stated, the first regular negotiating session in 1988 took place on June 15; the leadpeople present were Mangan, Burrows, and James Kaye, assistant executive director for the Union, and Carmody, Kantrowitz, Barbara Ginsberg, Homes, and Glen Schroeder, senior vice president and general counsel for KCET. At this meeting, each of the stations gave the Union its proposals (which Mangan testified were ''very complicated'' and ''not complete proposals'') and there was some discussion of these proposals. In addition, either at that meeting, or the one on the following day, the Union gave Respondents a three-page document, entitled: ''Pattern of Demands.'' Mangan explained that because of her involvement with the negotiations on the West Coast, she had not had a full opportunity to prepare more elaborate proposals. This pattern of demands included demands on Annenberg and foreign copyright. On June 15 and 16, the parties discussed the Union's pattern of demands and Respondents' proposals. In particular, at these sessions, the parties discussed Annenberg, foreign copyright, and other issues. The Union requested that WGBH present a written proposal regarding Annenberg. Carmody answered that in December 1987, they had a written Annenberg proposal, but that he would update it. On the other side, Respondents requested a specific foreign copyright proposal from the Union. At the bargaining session held on July 6, the Union resubmitted its July 18, 1986 proposal; Annenberg was unchanged on this proposal. At this meeting, Mangan again told Carmody that they were not going to get Annenberg without agreeing to foreign copyright. Kantrowitz testified that on either July 7 or 8, the stations again asked for the Union's foreign copyright proposal; at each meeting during this period, Mangan told them that they would have it shortly. Carmody and Kantrowitz told her that time was running out and they still had not received her principal proposal—foreign copyright. At this meeting, Carmody raised his voice and asked: ''Well, how am I supposed to negotiate here if I don't have one of your proposals in chief?'' Mangan answered: ''Well, if you want a foreign copyright proposal, here is the foreign copyright proposal. Consider the one we gave you in December 1987 the foreign copyright proposal.'' She gave them the prior proposal, unchanged. The parties then discussed foreign copyright and Annenberg. As regards the latter, the Union's position was that Annenberg and the rights they required were outrageous and gutted the contract.

The next session of note occurred on August 11: at this meeting Mangan requested that the Agreement be extended again as ''there was still a lot to bargain on''; she was told that there could be no further extentions as writing had to begin by August 15 for State of the World. At this meeting, the Union gave Respondents its proposal (dated the following day). Kantrowitz testified that this proposal was the same as the Union's December 1987 proposal, with one minor change (not relevant here) and Kantrowitz or Carmody asked whether that meant that the Union was rejecting all Respondents' prior comments. The parties then discussed foreign copyright and Annenberg; it was at this meeting that Respondents first offered 300 percent for Annenberg rights. Mangan replied that they needed more than that, and what they needed was foreign copyright. Barbara Ginsberg told Mangan that the SACD had told her that it was unnecessary to engage in a grant of copyright back and forth in order for the Union's members to share in foreign royalty collections. Mangan said that the SACD was telling her that it was necessary for them to have some sort of copyright interest in order to be able to sue broadcasters for their failure to pay royalties to the SACD, and that Jane Ginsberg would contact the SACD to attempt to clear up the confusion. Carmody told Mangan that on August 15, WGBH had to commence the writing functions for State of the World and they therefore had to reach agreement on Annenberg by that date. As of that meeting, Respondent's Annenberg proposal was the same as ''the document specific'' proposal they had prepared on December 1, 1987, except that on August 11, Respondents increased the minimum to 300 percent.

The parties next met on August 12. At this meeting the parties agreed to a 2-year term for a new agreement and Respondents made their first economic offer—4 percent for the first 18 months and 4 percent for the subsequent 6 months. This offer was rejected by the Union as inadequate.

The next meeting was on August 15 when Respondent announced that it could wait no longer, that it was unilaterally changing the compensation method from the four in 3 to 9 years unlimited for Annenberg programs, with compensation at 300 percent of the prior minimum. There is a credibility issue in the testimony regarding this meeting: Carmody, Kantrowitz, and Homes testified that Carmody used the term ''impasse'' at this meeting; Mangan testified that he never used that word; Burrows' testimony was somewhere in between. Although not crucial to the findings to be discussed below, I find from my observation of Carmody that it is the more likely possibility that they did use that term. That, together with the fact that I found Kantrowitz and Homes to be articulate credible witnesses, convinces me that Carmody did specifically state at this meeting that the parties were at impasse. Mangan testified that at this meeting Carmody announced that WGBH was implementing its Annenberg proposals, but that they would continue bargaining with the Union and would seriously entertain any new proposals of the Union. Carmody also reiterated WGBH's legal position that it was not obligated to bargain about the number of releases of a program (four in 3 or 9 years unlimited) as this was a management prerogative; it was only obligated to bargain about the money paid to the writers. Homes testified that at this meeting Carmody stated that it was unfortunate that they had not been able to reach an agreement, but that WGBH could wait no longer to commence writing services for State of the World, and he declared an impasse and said that he recommended to WGBH that they hire the writers for the program. Kantrowitz testified that at the commencement of the meeting, Carmody announced that WGBH was beginning writing services for State of the World and the parties had reached impasse on Annenberg and they were therefore going to implement their Annenberg proposal while they would discuss the impact of that on the writers. There was

''not much of a response'' from the Union. The parties then discussed other issues for the remainder of this meeting. Carmody testified that prior to the August 15 meeting, he asked Kantrowitz ''whether or not we had any additional breathing time'' and he was told that they did not. He opened the meeting with a summary of the negotiations since about January 1986, complained that they had been waiting for a revised foreign copyright proposal and the one that they received on August 11 was almost identical to the former proposal and, in fact, caused problems under French law for Barbara Ginsberg. He again stated that August 15 was the final date to reach agreement on Annenberg, and

> that I wanted to advise them that, I used the word impasse, I said, we're, as far as I can determine we're at an impasse and we intend to go forward today and implement the assignment of the performance of writing services on State of the World.

Carmody also stated that his legal position was that the stations had no obligation to bargain about the decision to do business with Annenberg and the rights needed for that programing. He did state that they would continue to entertain proposals regarding writer's compensation. Mangan rejected his position and said: ''You do what you have to do and we'll do what we have to do.'' They then proceeded to discuss other issues.

Burrows testified that at this meeting Carmody announced that WGBH was beginning the production of State of the World and that they intended to do it under the terms of their Annenberg proposal then on the table which provided for 300 percent of initial compensation. He testified that he could not say ''with certainty'' whether the word ''impasse'' was used at this meeting. Mangan testified that during the negotiations Carmody kept referring to deadlines for WGBH, but she did not believe it was real, although she believed that he would declare impasse. But ''as the days wore on, I gave up'' and decided that he was not going to declare an impasse: ''Intellectually, I thought, this is not going to happen.''

The parties next met on August 16 and 17; at one of these meetings, Carmody identified four or five items as ''must gets'' and encouraged the Union to do the same stating:

> Let's just identify those proposals which represent contract making or breaking proposals, and let them know that if we can reach an agreement upon these proposals, as far as we're concerned, we have a contract, and then let's ask them to do the same thing, and that's what we did.

Mangan stated that the Union did not bargain in that manner and overall agreement was not reached at this meeting.

The parties met again on August 18, in October, January, and February 1989, still with no complete agreement. The parties agreed on a joint exhibit of the Union's bargaining proposals initially submitted on June 16 and subsequently revised. The initial proposal contained 51 items; the parties stipulated that between August and January 9, 1989, they reached agreement on about 13 of these items: in addition, during that period, the Union withdrew some of its demands. There was never agreement on Annenberg or foreign copyright.

As stated, supra, on January 9, 1989, the Union submitted a new Annenberg proposal to Respondents conditional on the Respondents' accepting their foreign copyright proposal. Stated briefly, the Union's proposal provided that when Annenberg was the ''primary funder'' of a program which was ''prepared in connection with complete, credit worthy, college-level courses in fundamental areas of learning,'' the four in 3 provision of the agreement would be waived and the writers would receive 300 percent of minimum. This was not accepted by Respondents.

Prior to discussing impasse, and whether it existed on August 15, it is first necessary to identify issues that will be discussed briefly, or not at all. I find no support whatsoever for WGBH's affirmative defenses that the Board lacks jurisdiction because its assertion of jurisdiction would present a serious conflict with United States copyright law; those affirmative defenses are therefore dismissed. As a further affirmative defense, WGBH alleges that the Act does not impose on them the duty to bargain regarding the decision to produce programing for Annenberg CPB and other decisions regarding their Annenberg programing. While this may be true, it is not necessary to discuss this issue or the issue of management prerogative, mandatory subjects of bargaining or the Supreme Court's ruling in *First National Maintenance v. NLRB*, 452 U.S. 666 (1981). The Union was not asking Respondents to negotiate about their decision to produce programming for, or with the financial assistance of, Annenberg CPB: as stated by counsel for the Union in his brief: ''The Union never claimed an intention to prevent Respondents from dealing with whomever they wish. The Union sought only to regulate the terms and conditions of employment of writers it represents.'' The Union was telling the Respondents: ''Deal with whomever you wish, but when it affects the wages and conditions of employment of your employees—our members—*that* you must negotiate about.'' If Annenberg had not demanded 9 years of unlimited rights, with the resulting abrogation of the four in 3 provision of the Agreement, there would have been no such problem here. However, Annenberg CPB required that the stations give them 9 years' unlimited rights in order to receive their money. The number of releases of a writer's work product clearly affects his overall earnings. If a work can be telecast an unlimited number of times (''shown to death'') it is less likely to subsequently earn supplemental proceeds from such sources as tape sales or showings by commercial stations or ''superstations,'' than if it were shown for only 4 weeks in 3 years. The parties must therefore bargain about this issue.

There is no allegation that Respondents negotiated in bad faith contributing to the alleged impasse. In fact, there was some limited testimony that the parties could not negotiate as early and extensively as Respondents desired in mid-1988 because of negotiations and a strike the Union was tending to on the West Coast. This will also not be discussed. What will be discussed is whether the parties reached impasse on August 15.

In *Taft Broadcasting Co.*, 163 NLRB 475 (1967), the Board stated that after bargaining to impasse,

> that is, after good faith negotiations have exhausted the prospects of concluding an agreement, an employer does not violate the Act by making unilateral changes

> that are reasonably comprehended within his pre-impasse proposals.

More importantly to the instant matter, the Board then stated:

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

In enforcing the Board's Order in *Television Artists AFTRA v. NLRB*, 395 F.2d 622, 628 (D.C. Cir. 1968), the court stated: ''As we see it, the Board's finding of impasse reflects its conclusion that there was no realistic possibility that continuation of discussion at that time would have been fruitful.'' The state of mind of the participants in the negotiations is an important factor of whether impasse was reached and the burden of establishing that impasse existed on a certain date rests on the party asserting it, the Respondent. *Baytown Sun*, 255 NLRB 154 at 157. The court, in *NLRB v. Tex-Tan*, 318 F.2d 472, 482 (5th Cir. 1963), defined impasse as ''a state of facts in which the parties, despite the best of faith, are simply deadlocked.'' The administrative law judge in *PRC Recording Co.*, 280 NLRB 615, 635 (1986), stated that for impasse to exist—''Both parties must believe that they are at the end of their rope.'' Finally, in finding no impasse in *Alsey Refractories Co.*, 215 NLRB 785 (1974), the Board stated: ''We rely on what we believe to be a correct standard in determining deadlock in this case; namely, that the Respondent was not warranted in assuming that further bargaining would have been futile.''

Although overall negotiations between the parties did not commence until June 15, the parties met on a number of occasions between January 1986 and January 1988, at which time they discussed Annenberg and foreign copyright; in fact, in December 1987 they came fairly close to reaching agreement, at least, on the Annenberg issue. The complicating factor in these negotiations was, apparently, the foreign copyright issue. Whereas Annenberg was a straightforward issue that the parties knew would be settled with an increase in the minimum payment, foreign copyright was so difficult that it threw the parties off track. Barbara Ginsberg spent a half day testifying about the complications in the law on foreign copyright and how difficult it was to agree not only on contract language on the subject, but how the French system operated and what the law was on the subject. This, however, does not alone create an impasse. It is possible that movement on other issues (which had not been discussed prior to June 15) would have assisted the parties in settling foreign copyright. As the court in *Korn Industries v. NLRB*, 389 F.2d 117, 121 (4th Cir. 1967): ''Bargaining does not take place in isolation and a proposal on one point serves as leverage for positions in other areas.''

On the basis of all these facts, I conclude that no impasse existed on August 15. Although the parties had been discussing Annenberg and foreign copyright since January 1986, these discussions were irregular and were limited to these two subjects. In fact, the parties had not met for about 6 months when negotiations formally began on June 15. Between that date and August 15 when Carmody declared that an impasse had occurred, the parties met on only about 10 occasions. This is not that much when one considers that negotiations on the prior agreement, which took effect on July 1, 1985, did not conclude until December 1985. Additionally, at the time that impasse was declared, the parties were still awaiting legal advice from SACD on this most troublesome issue; it is possible that this advice would have assisted the parties in reaching agreement on this issue. Additionally, on August 15, Respondents were still, basically working from their 1987 proposals on Annenberg and foreign copyright. Finally, the fact that the parties were able to agree on numerous other issues over the following 5 months establishes that they were moving from prior positions, albeit slowly. *Excavating-Construction*, 248 NLRB 649, 650 (1980). Overall, I find that the parties were not deadlocked or at the end of their rope on August 15, nor do I believe that further bargaining would have been futile; in fact, it wasn't.

Most importantly, however, there is a major difference between a classic impasse in negotiations and the alleged impasse in the instant matter. WGBH is alleging that an impasse existed on August 15 because they hadn't yet reached an agreement with the Union and they had to begin writing services on State of the World on that date. Presumably, if they had not agreed to the two extension agreements they would have alleged that impasse existed on July 1 or August 1. An impasse exists when negotiations have run their course and the parties are deadlocked. An employer cannot advance the date of an impasse, or declare an impasse, based on an alleged business necessity. This is what WGBH did here. Therefore, I find there was no impasse on August 15,[9] and that by unilaterally changing the terms and conditions of employment of its writers who were represented by the Union and who were employed to work on the State of the World production, WGBH violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. KCET, WNET, and WGBH are each employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of each of the Respondents constitute units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All persons who furnish literary material, as defined in the Agreement, except for staff employees furnishing material other than format, stories, teleplay (telescripts) and narrations which are other than news, as defined in the Agreement.

4. Since, at least, prior to 1985 the Union has been the designated exclusive representative of the employees in the above-named appropriate units for the purposes of collective bargaining within the meaning of Section 9(a).

[9] As I have found that no impasse existed on August 15, it is unnecessary to consider the argument of counsel for the General Counsel and counsel for the Union that because Respondent WGBH did not provide the Union with the requested information regarding offset of the hyphenates there could be no impasse.

5. The last collective-bargaining agreement between the Union and each of the Respondents was for the period July 1, 1985, through June 30, 1988, and was extended to August 14, 1988.

6. WGBH violated Section 8(a)(1) and (5) of the Act by failing to provide the Union with information it had requested since about July 8, 1988, regarding compensation of hyphenates who were its members.

7. KCET and WNET did not violate the Act in this manner.

8. WGBH violated Section 8(a)(1) and (5) of the Act by unilaterally changing the terms and conditions of employment of its writers by implementing a new wage schedule for its writers on the Annenberg supported State of the World program, at a time when there was no impasse in the negotiations between the parties.

9. The above unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that WGBH has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Having found that WGBH has failed and refused since about July 8, 1988, to supply the Union with the requested information regarding the pay of its hyphenates, during the term of the Agreement, and the breakdown of this pay between writing and producing functions, I shall recommend that WGBH cease and desist therefrom and, on request, to promptly supply this information to the Union.

I have also found that on August 15, 1988, WGBH unilaterally implemented a new pay schedule for the writers it employed who were represented by the Union and who were writing for the Annenberg-supported State of the World project, by replacing the four in 3 release pattern with unlimited showings for 9 years, but at 300 percent of the prior minimum fee, at the time when there was no impasse in the negotiations between the parties.

Having found that the WGBH unilaterally implemented the 300-percent pay scale for the writers employed on State of the World project, at a time when no impasse had occurred, I shall recommend that Respondent be ordered to, on request, bargain collectively in good faith with the Union on the terms and conditions of employment of unit employees and, if an understanding is reached, to embody the understanding in a signed agreement.

I shall also recommend that WGBH be ordered to, if requested by the Union, reinstitute the wages and terms and conditions of employment that existed before its unlawful changes, and to make whole unit employees for any losses suffered as a result of its unlawful action in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest thereon to be computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The amount due to the affected employees will be determined in a supplemental proceeding. Counsel for the Union, in his brief, requests that my recommended Order include a prohibition against any release beyond the preimplementation four in 3 as set forth in the Agreement. This is not necessary because, as stated above, I shall recommend that WGBH be ordered to reinstate the wages and terms and conditions of employment that existed prior to August 15, 1988, which would include the four in 3 pattern.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, WGBH Educational Foundation, a/k/a WGBH-TV, Boston, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Union, the Writers Guild of America, East, Inc., the exclusive bargaining representive of the employees in the unit described above, by refusing to provide the Union with the information it requested, commencing about July 8, 1988, regarding the pay of the hyphenates it employed during the term of the Agreement.

(b) Refusing to bargain collectively with the Union by unilaterally implementing changes in wages and terms and conditions of employment of unit employees at a time when no impasse in bargaining with the Union had occurred.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Promptly furnish the Union, on request, with the compensation of the hyphenates it employed during the years 1985, 1986, 1987, and 1988, the compensation broken down by writers' fees and producers' fees.

(b) On request, reinstate the wages and terms and conditions of employment that existed before the unlawful unilateral changes and make whole unit employees for any losses suffered as a result of these unilateral changes, with interest. However, no provision of this recommended Order shall in any way be construed as requiring the Respondent to revoke unilaterally implemented improvements in terms and conditions of employment to unit employees.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Boston, Massachusetts facility copies of the attached notice marked ''Appendix.''[11] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the

---

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the allegation that KCET and WNET violated Section 8(a)(1) and (5) of the Act by refusing to provide the Union with the information requested on about July 8, 1988, and at subsequent times, is dismissed.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with the Writers Guild of America, East, Inc., the Union, the exclusive bargaining representative of the employees in the unit described below, by unilaterally implementing changes in wages and terms and conditions of employment of these employees at a time when no impasse in bargaining with the Union had occurred.

WE WILL NOT fail and refuse to furnish the Union with the information it requested, which is relevant and necessary to the Union's status as the exclusive collective-bargaining representative of our employees in the unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain collectively in good faith with the Union as the exclusive bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed written agreement:

> All persons who furnish literary material as defined in the collective-bargaining agreement, except for staff employees furnishing material other than format, stories, teleplay (telescripts), and narrations which are other than news as defined in the collective-bargaining agreement.

WE WILL furnish to the Union information it requested beginning on or about July 8, 1988, regarding the payments to hyphenates during the period 1985 and 1988 and how it was apportioned between writers' duties and producers' duties.

WE WILL, on request, reinstate the wages and terms and conditions of employment that existed before the unlawful unilateral changes and make whole unit employees for any losses suffered as a result of these unilateral changes, with interest. However, no provision of this notice shall in any way be construed as requiring us to revoke unilaterally implemented improvements in terms and conditions of employment to unit employees.

WGBH EDUCATIONAL FOUNDATION, A/K/A
WGBH-TV